



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 1713 OF 2011

BETWEEN

JEREMIAH MBITHI NGEWA
CLAIMANT

VERSUS

INTEX CONSTRUCTION LIMITED
RESPONDENT

Rika J

CC. Mr.Kidemi

Mr. Malonza instructed by Sisule Munyi Kilonzo & Associates, Advocates for the Claimant

Mr. Munoko instructed by Ameyo, Guto, Etole & Company Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. Jeremiah Mbithi Ngewa filed this Claim on 6th October 2011 and a Reply to the Statement of Response on 23rd January 2012. The Respondent filed its Statement of Response on 19th October 2011. The Parties subsequently filed their bundles of documents, separate from their main Pleadings.
2. The Claimant testified on 2nd November 2012 and called one Witness John Mulu Kilungu who gave evidence on 26th February 2013, when the Claimant's case closed. The Respondent testified through its Acting Human Resource Officer John Muriu on 12th June 2013, and its Senior Accountant Raymond Otieno Omondi on 1st October 2013, when the hearing closed.
3. The Claimant states he was employed by the Respondent Road Construction Company as a General Clerk, on 8th February 1993. He was to work in the Accounts Section at the Respondent's Head Office Nairobi. He was later promoted to the position of an Accountant, a position he held until his contract was terminated.
4. He was given a written contract of employment and states that his terms were also regulated by the

Collective Bargaining Agreement [CBA], concluded between the Kenya Association of Building and Civil Engineering Contractors and the Kenya Building, Construction, Timber, Furniture and Allied Industries Employees Union. He was a Unionisable Employee, but not a Member of the Trade Union, and was covered under the CBA. The Respondent had always adopted the CBA in determining the terms and conditions of employment of all the Unionisable Employees, regardless of the Employee's membership of the Trade Union.

5. On 26th March 2007 the Respondent transferred the Claimant from the Head Office to Ena- Ishiara-Chiakariga Road Project Site. He worked there up to 26th November 2010, when he was returned to Nairobi. The Claimant handed over all the Accounts records relating to the project to the Human Resources Manager at the Site, in the presence of the Claimant's Successor. It was noted there were un-booked vouchers and receipts amounting to Kshs. 64,703. The Claimant reported to the Head Office on 30th November 2010. He however received a letter dated 16th December 2010 from the Respondent, terminating his contract of employment. No reasons were given for the decision. He was not given a notice, a hearing, or reasons for the decision before termination. He states that termination was unfair and unlawful, and prays for the following Orders-:

- a. Unpaid salary for 1 month between 16th November 2010 and 15th December 2010 at Kshs. 30,000;
- b. Housing allowance at Kshs. 6,000;
- c. Unpaid leave of 42 days at Kshs. 58,153;
- d. 2 months' salary in lieu of notice at Kshs. 60,000;
- e. 12 months' salary for unfair compensation at Kshs. 360,000; and
- f. Severance pay at Kshs. 333,461;

Total..... Kshs. 847,615

He also prays for costs; interest on the monetary items; certificate of service; and any other order the Court may deem fit to grant.

6. Ngewa testified house rent allowance and annual leave pay was payable in accordance with the CBA. His transfer allowance was pegged on and paid at 30% of the basic salary, in accordance with the CBA. He had prior to being transferred to the Site Project, worked at other Sites in Kapsabet and Kitale. The un-booked amount of Kshs. 64,703 meant the item had not been posted; it did not mean the money had been stolen, lost or unaccounted for. He was not provided with housing accommodation or house rent while in Nairobi. He expected a minimum of 20% of his basic salary as house rent allowance. He worked for 17 years, during which he only received 1 warning letter in 2008-2009. He was not paid any terminal benefits. Work was still in progress when his contract was terminated. His salary was at Kshs. 30,000 monthly, as of the date of termination.

7. Cross-examined, Ngewa stated his contract had a termination clause. If termination was during the period of probation, it required either Party, to give the other notice of 24 hours. After probation, notice was for 1 month. The Claimant was not a Member of the Trade Union, and was not remitting Trade Union Dues. There was only 1 contract between the Claimant and the Respondent- the one of 1993. Termination took place at Nairobi. The work at the Ishiara site was finished. He was not paid house rent allowance of Kshs. 6,000 while at Nairobi. He has been to the Head Office seeking terminal dues which have remained unpaid. He cleared with the Respondent. He was offered a new contract which he refused to sign in March 2010. The Petty Cash record for May to November 2010 had not been updated. Receipts were being held by management. The amount involved was Kshs. 64,702. It was accounted for. Reconciliation was done. Accounting over this money was not given as the reason for termination of employment. The Claimant had received previous warning from the Respondent. It is incorrect to say the Claimant was fond of committing errors at work. His pay slip did not show trade union dues were deducted from his salary. Accountants were not covered under the CBA. Ngewa reiterated on redirection that he was covered under the CBA. Transfer allowance was paid based on the CBA. He was not paid house rent allowance at Ishiara because he was provided housing accommodation by the Respondent. Termination of his contract amounted to redundancy and fell under Clause 17 of the CBA. Work

continued at the time of the transfer and termination. He had one warning in his file. It was not enough to justify dismissal under the CBA.

8. John Mulu Kilungu worked for the Respondent as an Accountant, between 5th August 2005 and 31st March 2011. He was retired. He was paid 2 months' salary in notice, and gratuity in accordance with the CBA Clause 19. One was entitled to 22 days for every completed year of service. Cross-examined, the Witness told the Court he retired and was paid his benefits. He was not aware how the Claimant's termination came about. The Documents accompanying the Statement of Response showed the Claimant was paid gratuity of Kshs. 293,344. Kilungu testified on redirection that the documents did not show that the Grievant anywhere acknowledged receipt of the gratuity.

9. The Respondent's position is that the Claimant was its Employee as stated in the Claim. He was not Unionisable, and was not a Member of any Trade Union. He was not covered by the CBA applicable to his Unionisable Colleagues. It is true he was transferred from Ishiara, but not true that he handed over the books of account. He concedes in his Statement paragraph 13 that, he did not account for money which was under his control. He was informed the failure to account was the ground for termination. Termination was on account on the Claimant's admitted failure to account for Kshs. 64,703, not on redundancy.

10. John Muriu, the Acting Human Resources Officer of the Respondent testified that the Claimant failed to account for funds entrusted to him in his role as the Accountant, by his Employer, the Respondent herein. The Claimant worked as the Site Accountant at Ishiara in Embu. The Claimant refused to sign a contract of employment when required to do so by the Respondent. The initial contract of 1993 continued to apply to him. He is entitled to 1 month salary in lieu of notice, outstanding leave days, and salary for days worked. He was paid gratuity in 2009, a net sum of Kshs. 234,131.02. He did not clear with the company, which is a precondition for payment of terminal dues. All Employees who were not housed were paid house rent allowance. Accountants are not covered under the CBA.

11. In cross-examination, Muriu testified that the letter of termination gave no reason for the decision. The Claimant however held a meeting with Human Resources Officer on the date of termination. Muriu did not know if reasons for termination were given in this meeting. He handed over on termination. Clearance is different from handing over. Respondent's document, at page 9 of the Respondent's Bundle of Documents, showed the persons who were to be paid gratuity. It summarized what was remitted in favour of the Employees by the Respondent, to their Bank Accounts. It is true the Respondent proposed to meet the Claimant on 9th February 2011, which was after termination. The purpose of the meeting was for the Claimant to explain to the Respondent the whereabouts of the missing funds. The Respondent has not counterclaimed the missing sum. The Claimant was paid transfer allowance along the same line as set out under the CBA. The Respondent only borrowed this method from the CBA. Redirected, Muriu stated the meeting after termination was to discuss clearance. There was no need to file a counterclaim because the Respondent could deduct its dues from the Claimant's terminal dues. Ngewa did not account for the money spent from May to November 2010. Gratuity was paid to staff through their bank accounts.

12. Raymond Omondi testified did not exactly know why the Claimant lost his job. There was unaccounted for petty cash for October to November 2010. The amount was Kshs. 73,680. Omondi was part of the Respondent's Audit Team. The general procedure was that the Site Accountant would forward the budget for the next month. The Head Office would send money to the Client's Bank Account. One of the signatories would have to be from the Head Office, the other being the Site Manager. The Site Accountants prepared budget for the respective Sites. The budget was forwarded to the Project Manager, and cheque drawn in the name of the Site Agent or Accountant for withdrawal. This was done each month. When the Audit Team visited the Site, the bank balance and cash in hand mismatched. Gratuity was computed by the Accounts Office. This was done in the case of the Claimant and computation signed by the Management and the Chairman. Accountants were not covered under the CBA. The unaccounted for sum, was Kshs. 170,000. On being questioned by the Audit Team, the Claimant availed receipts, and the sum came down to about Kshs. 73,000.

13. Cross-examined, Omondi stated the amount reduced after the Claimant produced the receipts. At the

time of the audit, receipts were not there. They have not been included in the Respondent's Bundle of Documents. Employees did not sign anywhere on being paid gratuity. Transfer was direct to their Banks. Omondi could not recall the exact date when the audit revealing Kshs. 73,000 to be missing, was carried out. Omondi did not know if the unaccounted for money, was the reason for termination. Looking at the Clearance Form, it was not possible to say Ngewa owed the Respondent Kshs. 73,000. Omondi testified on redirection that it was not his role to know why the Claimant was dismissed. He had to get clearance from all departments. Clearance has not been finalized. Omondi could not access the Claimant's Bank Account to confirm that the Claimant received gratuity. The Respondent prays the Court to dismiss the Claim.

The Court Finds and Awards:-

14. The Claimant was employed by the Respondent Road Construction Company as a General Clerk, on 8th February 1993. He later became the Accountant. He was moved to various Sites in Kitale and Kapsabet as Site Accountant, before reverting to the Head Office in Nairobi for reassignment. On 26th March 2007, he was transferred to Ishiara in Embu County, where the Respondent was undertaking a construction project. He was recalled after 3 years to the Head Office. His contract was terminated on 16th December 2010. He claims this decision was unfair and unjustified. He claims the remedies listed at paragraph 5 of the Award. At paragraph 21 of the Statement of Claim, he urges the Court to find in the alternative, that termination was on account of redundancy.

15. There is no evidence or material on record, to suggest the Respondent was encountered with a redundancy situation as known under Section 40 of the Employment Act 2007. There is absolutely no material to indicate that termination was driven by economic reasons, or that termination was based on the operational requirements of the Employer. The role of Accountant was neither phased out, nor diminished. The Claimant's contract was not terminated on the ground of redundancy. *The claim for severance pay in the amount of Kshs. 333,461 has no basis and is rejected.*

16. The Industrial Relations Charter revised on 30th April 1984, under Part B, Clause 11 states that the following will be excluded from Union Representation:-

- a. Persons who are formulating, administering, coordinating, and/ or controlling any aspects of the Organization's Policy.
- b. Staff who perform work of a confidential nature as shall be defined by a Tripartite Committee.
- c. Any other category of staff, who may be in the case of any particular undertaking, be excluded from Union Representation by mutual agreement.

17. Traditionally, Accountants are deemed to fall within this list of exclusion. They are deemed to perform work of confidential nature, and their unionization would be prejudicial to stability and industrial peace. There is always a risk that such Employees, would for instance, in times of industrial action led by their Trade Union, put the spanner in the works by betraying confidential information obtained in the course of their duties. They are not generally eligible for membership of trade unions [see Section 2 of the Labour Relations Act on definition of Unionisable Employee].

18. The CBA concluded between the Building and Civil Engineers' Association and the Building Union did not categorize Accountants, as part of the Employees covered under the CBA. The range of job categories covered under the CBA, are shown in the addendum to the CBA.

19. The Claimant was not a Member of the Building Union. There were no trade union dues deducted by the Employer from the Claimant's salary, and paid to the Union, under Section 48 of the Labour Relations Act. He was not Unionisable, and therefore was not eligible to pay agency fees, under Section 49 of the same Law. He did not pay any direct subscription fees to the Union under Section 52 of the Act. There is generally nothing to spread the benefit of the CBA concluded between the Employer and the Trade Union, to the Claimant.

20. It was proper for the Respondent, as long as the Claimant did not object, to adopt certain Clauses in

the CBA, in defining the Claimant's terms and conditions of employment. There was nothing wrong in adopting the CBA on transfer allowance or gratuity. The Respondent and the Claimant were free to negotiate the terms and conditions of employment, borrow from the CBA, but such borrowing would not make the Claimant Unionisable, or entitle him to claim full coverage under the CBA. In the ***Industrial Court Cause Number 109 of 2010 between Transport and Allied Workers Union v. SITA [2011] e-KLR***, this Court found that Persons outside the coverage of a CBA, and their Employers, could borrow the terms and conditions contained in a CBA, and incorporate them in the individual contract of the Employee who is not eligible to benefit from the CBA. The Parties were therefore within their rights in adopting certain Clauses within the CBA; that however did not make the Claimant Unionisable or entitle him to a blanket application of the CBA.

21. He would therefore not be entitled two months' salary in lieu of notice or severance pay under the CBA. Gratuity in any case was paid to the Claimant in 2009, a fact he did not come out honestly to acknowledge. The Court is convinced by the documents availed by the Respondent, and the oral evidence of its Officers, that the Claimant was paid gratuity. He was also subscribed to the N.S.S.F, so that in terms of Section 35 of the Employment Act 2007, and considering the rule that there should be no double social security payments made on the Employee, would be deemed to have left employment with more than his fair share of social security payment.

22. The Respondent through John Muriu offered to pay the Claimant 1 month salary in lieu of notice, annual leave days and days' worked. Unfortunately, Muriu did not give the exact details of the leave days and days worked and not paid. ***The Court grants the Claimant 1 month salary in lieu of notice at Kshs. 30,000, salary for the period between 16th November 2010 and 15th December 2010 at Kshs. 30,000 and 42 days of unpaid leave at Kshs. 48,461.***

23. There was no specific reason given by the Respondent in its letter of termination dated 16th December 2010. John Muriu stated in is evidence, and it was stated in the Statement of Response, that the Claimant failed to account for money which was under his control. The amount was stated by the Respondent to be Kshs. 73,680, and by the Claimant to be Kshs. 64,703. Whichever the correct amount, the Claimant did not as the Site Accountant, give an explanation for the shortfall. The Auditor, Mr. Omondi, explained that this amount was originally in the sum of Kshs. 170,000, which came down to Kshs, 73,680 after the Claimant was able to produce receipts. The Claimant did not give an explanation on the outstanding amount. He was not able to show in Court that he handed over complete accounting records when he left Ishiara. The Respondent was entitled to summarily dismiss the Claimant under Section 44 [4] [c] and [g] of the Employment Act 2007. There existed valid reason in the decision to terminate. Termination was substantively justifiable as required under Section 43 and 45 of the Employment Act 2007.

24. The dictates of fair procedure were disregarded. There is evidence the Claimant was recalled to the Head Office on 30th November 2011. There was a meeting between him and the Human Resources Manager on 16th December 2010. He was issued the letter of termination dated 16th December 2010, on the 17th December 2010. The reason for termination is not revealed in the letter. There were no formal charges put to the Claimant. There was no disciplinary panel convened. The Claimant was not advised of his right to be heard, accompanied by a Trade Union Representative if unionized, or a Workmate of his choice, as intended by Section 41 of the Employment Act. There is no record of a hearing. The minimum standards regulating fair procedure were not adhered to. ***The Claimant is entitled to compensation for breach of fair procedure, which the Court grants at 3 months' salary, at Kshs. 90,000.***

25. There was no proper answer by the Respondent to the claim for house rent allowance. At Ishiara, the Claimant was provided with housing accommodation by the Respondent as is required under 31 of the Employment Act 2007. He was therefore, correctly, not paid house rent allowance at Ishiara. Once he was recalled to Nairobi, he claims there was no housing accommodation given to him by the Respondent, at, or near, the place of work, or house rent allowance paid to him. The Court is satisfied he is entitled to 15% of his salary at Kshs. 4,500 as house rent allowance for the last month he was based in Nairobi. ***He is granted Kshs. 4,500 as house rent allowance. IT IS ORDERED IN SUM-:***

[a] Termination was for a valid reason, but unfair on account of procedure;

[b] The Respondent shall pay to the Claimant 3 months' salary in compensation for unfair termination at Kshs. 90,000; 1 month salary in lieu of notice at Kshs. 30,000; unpaid salary at Kshs. 30,000; 42 days' of annual leave at Kshs. 48,461; and house rent allowance at Kshs. 4,500- total Kshs. 202,961;

[c] The full amount be paid within 30 days of the delivery of this Award;

[d] The Respondent to avail to the Claimant his Certificate of Service forthwith; and

[e] No order on the costs and the interest.

Dated and delivered at Nairobi this 1st day of April 2014

James Rika

Judge